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WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

STATE OF WISCONSIN : IN ARBITRATION : MILWAUKEE COUNTY

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In the Matter of the Arbitration
of a Dispute Between:

THE CITY OF OAK CREEK

AND

OAK CREEK PROFESSIONAL
POLICEMEN"S ASSOCIATION

DECISION ON
ARBITRATION

Case No. XXXIV
No. 25493
MIA-459
**Decision No. 17622-A**

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This is an arbitration proceeding between the City of Oak Creek and the Oak Creek Professional Policemen's Association; pursuant to Sec. 111.77 (Municipal Employment Relations Act) 1977. At issue are the terms of a collectively bargained employment contract covering the 1980 calendar year.

The City of Oak Creek (hereinafter the "City") is a municipal corporation, organized and existing under the laws of the State of Wisconsin. The Oak Creek Professional Policemen's Association (hereinafter the "Association") is recognized by the City as the sole and exclusive bargaining agent for all employees in the bargaining unit, 35 in number, consisting of police sergeants, detectives, and patrolmen, for the purpose of engaging in conferences and negotiations to establish wages, hours, conditions of employment and other benefits.

The parties were unable to independently reach full agreement on the terms of an employment contract

for the 1980 calendar year. On December 18, 1979 the Association filed a petition with the Wisconsin Employment Relations Commission requesting the Commission to initiate final and binding arbitration proceedings pursuant to Sec. 111.77(3) of MERA. An informal investigation was conducted and a member of the Commission, Doublas V. Knudson, being satisfied that an impasse within the meaning of Sec. 111.77(3) had been reached, recommended that the Commission issue an order requiring final and binding arbitration, pursuant to Sec. 111.77(4)(b) of MERA.

This arbitrator was appointed by the Wisconsin Employment Relations Commission and the first hearing before the arbitrator was held in the City of Oak Creek, Wisconsin on June 16, 1980. Both parties presented proof and documentary evidence in support of their respective positions. At the conclusion of the hearing, briefs were submitted, the last of such briefs having been submitted on August 20, 1980.

Statute involved:

The controlling section in this matter is Sec. 111.74(4)(b) 1977 of the Municipal Employment Relations Act, which in its relevant parts states as follows:

> "(4) There shall be 2 alternative forms of arbitration:
>
> ....

(b) Form 2. . . . The arbitrator shall select the final offer of one of the parties and shall issue an award incorporating that offer without modification.

In reaching a decision, the arbitrator is required by Section 111.77(6)(1977) of the Municipal Employment Relations Act to give weight to the following factors:

(a) The lawful authority of the employer.
(b) Stipulations of the parties.
(c) The interests and welfare of the public and the financial ability of the unit of government to meet these costs.
(d) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally:
(1) In public employment in comparable communities.
(2) In private employment in comparable communites.
(e) The average consumer prices for goods and services, commonly known as the cost of living.
(f) The overall compensation presently received by the employees, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
(g) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
(h) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

The Wisconsin Supreme Court in Milwaukee Deputy Sheriff's Ass'n v. Milwaukee County, 64 Wis.2d 651, 657, 221 N.W.2d 673 (1974), in considering the purpose of final offer arbitration quoted Long and Febille in Final-Offer Arbitration: "Sudden Death" in Eugene, 27 Industrial & Labor Relations Review 186, 190 (1974) where they stated:

> The overriding purpose of the final-offer procedure...is to induce the parties to make their own compromises by posing potentially severe costs if they do not agree. In other words, a successful final-offer procedure is one that is not used; one that induces direct agreement during the proceedings; or, using a less rigorous definition of success, one that substantially narrows the area of disagreement. And when the procedure is used, the function of the arbitrator is to operationalize its potential costs by deciding against the party that advocated the less reasonable offer(s). In other words, the final-offer mechanism is intended to promote the give-and-take of good-faith bargaining by acting as a 'strikelike' substitute rather than to serve as a mechanism by which arbitrators may exercise their discretion.

Clearly, then, when contract negotitations do go to final and binding final-offer arbitration, it is the arbitrator's task to determine which final offer is the most reasonable in light of all the attending circumstances, and in light of the statutory guidelines of Section 111.77(6)(1977) of the Municipal Employment Relations Act. This function of the arbitrator was well stated in an arbitration decision written by Arbitrator William W. Petrie, In Interest Arbitration Case XXXIII, MP/25402, MIA-454:

(I)nterest arbitration is not an exact science where the arguments and the statistics of both parties can be plugged into a formula and the correct result tabulated. Rather, it is an attempt to reach the same decision that the parties themselves would have reached had they been successful in bargaining to a conclusion. This factor was dealt with as follows by Elkouri and Elkouri:

> In a similar sense, the function of the "interest" arbitrator is to supplement the collective bargaining process by doing the bargaining for both parties after they failed to reach agreement through their own bargaining efforts.

Possibly the responsibility of the arbitrator is best understood when viewed in that light. This responsibility and the attitude of humility that appropriately accompanies it have been described by one arbitration board speaking though its chairman, Whitley P. McCoy:

> Arbitration of contract terms differs radically from arbitration of grievances. The latter calls for a judicial determination upon considerations of policy, fairness, and expediency, of what the contract rights ought to be. In submitting this case to arbitration, the parties have merely extended their negotiations - they have left to this board to determine what they should by negotiations, have agreed upon. We take it that the fundemental inquiry, as to each issue, is: <u>what should the parties themselves, as reasonable men, have agreed to?... To repeat, our endeavor will be to decide the issues, as upon the evidence, we think reasonable negotiators, regardless of their social or economic theories might have decided them in the give and take of bargaining....</u> (Underline supplied).

In applying the above principles to the case at hand, it should be kept in mind that an interest arbitrator will be reluctant to overturn an established benefit and/or will be reluctant to add new benefits or to innovate unless the statutory criteria are clearly met. The reluctance of the interest arbitrators to disturb provisions or benefits contained in prior agreements was also referenced by Elkouri and Elkouri:

> Arbitrators may require "persuasive reason" for the elimination of a clause which has been in past written agreements....

Contract changes agreed upon:

The bulk of the terms of the 1978-1979 agreement between the City and the Association are to be carried over unaltered into the 1980 contract. The changes that have been agreed to are relatively minor; they include:

(a) retroactive effect to January 1, 1980;

(b) duration of one year from Janury 1, 1980;

(c) receipt of detective pay for patrol officer serving in such a capacity for over one hour;

(d) revised detective shift schedule;

(e) 100% reimbursement for the cost of any officer's registration and tuition fees in a job related educational or training program;

(f) personal auto mileage reimbursement rate change from $0.14 to $0.17 per mile; and

(g) provision for jury service with full pay.

Provisions requiring arbitrator's action:

There are four contract provisions on which the parties could not reach agreement and which have forced the negotiations to yield to binding arbitration. Those provisions involve (a) the adjustment of the wage schedule for all employees, (b) the addition of a long term disability program, (c) the addition of a dental prepayment plan, (d) and the allowance of time off with pay for Association negotiators. Each of these disputed provisions will be considered in turn in light of the guidelines of Section 111.77(6)(1977) of the Municipal Employment Relations Act.

Wage schedule:

The first disputed provision is the wage schedule. The City's final offer proposes a nine percent increase of the 1979 salary schedule for all employee classifications. The Association proposes an eight percent increase, effective January 1, 1980, plus an additional three percent increase on July 1, 1980. The effect of the Association's two step wage provision is to increase each employee's 1980 earnings by 9.6 percent over his 1979 earnings. This is not substantially greater than the 9.0 percent increase offered by the City. However, monthly salaries for Association members at the end of 1980 will have increased 11.24 percent from what they were at the end of 1979. This increase would be larger than that given to any other Milwaukee area police department in 1980. It would give the members of the Association the second largest monthly salary among Milwaukee area police departments by the end of 1980. In 1979, Oak Creek

police personnel had only the sixth or seventh highest monthly salaries among area police forces.

Data supplied by the Association, taken from the Consumer Price Index, United States Department of Labor, Bureau of Labor Statistics May 23, 1980 Statistics Release No. 359, indicates that the cost of living in the Milwaukee area increased by approximately 19 percent in 1979. In the first three months of 1980, the Milwaukee area cost of living index continued to rise at an annualized rate of about 18 percent. These increases are slightly above the 14 percent rates for the same periods found to be the average for the Nation's cities (data taken from the Labor Relations Reporter, Bureau of National Affairs; supplied by the Association).

None of the Milwaukee area police departments have come close to keeping pace with the rising cost of living. The average increase in 1980 police department total yearly wages over their 1979 amounts is between nine and ten percent, the smallest increase being seven percent in several communities, and the largest being ten percent in the City of Milwaukee. The fact that no Milwaukee area police department kept pace with the increasing cost of living, provides an indication that had the Oak Creek negotiations not gone to arbitration, they also would have resulted in the establishment of a wage increase substantially below the cost of living increase but in line with the average granted to other Milwaukee area police departments. Both the City's offer, at 9.0 percent, and the Association's offer, at approximately

9.6 percent, fall within this average range. Either increase would allow Oak Creek police personnel to maintain their rank in the lower half of the top ten salaried police departments in the Milwaukee area.

The difference in effect between the one step increase of 9.0 percent proposed by the City, and the two step increase of 8.0 percent and 3.0 percent advocated by the Association, however, should also be considered. Several area police departments have included a two step wage increase provision in their 1980 contracts. The device can be viewed as a compromise of sorts. It allows the employer to keep the next year's wage increase low, while substantially improving the employees' bargaining position for the following year's contract negotiations. In effect, it postpones a substantial wage increase for one year.

For example, under the Association's proposal, Oak Creek police personnel will earn only 9.6 percent more in 1980 than they did in 1979. However, because of their mid-year wage hike, their monthly salary at the end of 1980 will be 11.24 percent higher than it was at the end of 1979. This monthly salary will undoubtedly be the base salary from which the 1981 contract increase will be computed. So, assuming a one step 9.0 percent increase is granted in 1981, the wages earned in 1981 will be 21.25 percent more than those earned in 1979, instead of the 19.46 percent which would result from a 9.0 percent increase following a 9.6 percent

one step increase. The two step device in effect hides an extra 1.79 percent increase which turns up in the form of actual wages one year later.

Consequently, while 1979 Association wages would not appreciably increase in comparison with other Milwaukee area police departments, the base salary for 1981 contract negotiations would be second only to that of the City of Milwaukee Police Department, an increase in rank of six to eight places. It is doubtful that once the Association attained such a ranking, it would allow itself to slip from that position, asking in subsequent years for wage hikes at least equal to the average obtained by other police departments.

Since it is the arbitrator's task to choose the most reasonable final offer, the one which would most nearly reflect the result that would have been obtained had the parties themselves reached agreement, it is the arbitrator's opinion that the City's offer on the question of wages alone is the more reasonable. The City's offer, while not keeping pace with the cost of living, nevertheless substantially maintains the relative salary position of the Oak Creek police personnel as compared with other Milwaukee area police departments. The Association offer, on the other hand, would substantially improve the wage position of Oak Creek police personnel with respect to other area departments.

Long-term disability payment demand:

The second disputed provision is that concerned with Long-Term Disability Insurance. The 1978-1979 contract between the City and the Association does not include a long-term disability plan. The final offer made by the City does not provide for such a plan. The Association's final offer requests such a plan having the following terms:

> The city shall provide long-term disability coverage at 66-2/3% of the employee's base pay to all regular full time employees. Benefits shall be payable after sixty (60) working days of disability to age 65; provided, however, that no employee shall simultaneously collect both sich leave and long-term disability benefits. In the event that better long-term disability coverage is provided to any other Oak Creek public employee labor organization, this improved coverage shall automatically be provided to the Oak Creek Professional Policemen's Association.

Out of nearly thirty Milwaukee area police departments, only six have been found to provide their employees with some form of long-term disability assistance; Butler provides for maximum payments of $100 per week for 26 weeks; Elm Grove allows payments of $100 per week for 52 weeks, treating such payments as additional sick leave; Greenfield pays a maximum of $100 per week for 17 weeks after the employee's accumulated sick leave has been exhausted; Hales Corners provides payments of $100 per week maximum for 26 weeks after a waiting period of 30 days; Mequon maintains Salary Continuation Insurance, and pays two-thirds of the premium cost; and West Allis simply provides varying lengths of sick leave with pay, depending on the employee's length of service.

None of these programs come close to matching the benefits which could be realized under the Association's proposed plan. Each of them, except for that of Mequon, limits the period of time during which payments will be paid to a year or less, unlike the Association's proposed plan which would continue to the employee's 65th birthday. Four of the plans will pay only $100 per week, whereas the Association's plan would maintain the disabled employee at two-thirds of his regular salary at the time he became disabled. Clearly, the plan requested by the Association is of an entirely different scope and nature than those of all other area departments, except for that of the City of Mequon.

The lack of long-term disability plans in area police contracts is likely in part due to coverage for policemen under Wis. Stats. Sec. 66.191(1977), and workmen's compensation for occupational disability, and under Wis. Stats. Sec. 41.13(1977) for non-occupational disability. These state statutory plans, however, do not provide coverage to the extent that the Association's plan would. Neither party have apparently given any consideration to the impact of disability insurance benefit payments under the federal Social Secuirty Act, 42 U.S.C.A. § 423 which provides for disability benefits to all persons under the act who have not reached the age of sixty-five and who are found to be unable to engage in any substantial gainful activity.

Whether the latter provision, had it been called to the attention of the parties at the appropriate time, would have altered their positions, is of course not known.

The arbitrator recognizes, however, that nearly all other City of Oak Creek employees, other than the firemen, have been provided with long-term disability coverage plans which are only slightly inferior to that sought by the Association. The salary and benefits of the Oak Creek Police Chief, his Captain and two Lieutenants, as non-union management personnel, are governed by Oak Creek City ordinance No. 837 which also provides for long-term disability coverage.

While no evidence has been submitted with regard to the extent other Milwaukee area municipalities have provided long-term disability coverage to non-police employees, the extent to which the City has already provided such coverage to its non-police, and even some of its police personnel, leads this Arbitrator to believe that such a program would be acceptable to the City, and within its financial ability to provide. On this item alone, then, the Association's final proposal appears to be the most reasonable in light of the terms which most likely would have been agreed upon by the parties themselves had this matter not gone to arbitration.

The "me too" provision included in the long-term disability proposal, however, is disturbing. While such clauses are frequently used in labor contracts, their effect can be seen to be detrimental to both employer and employee. Although the contract here in issue is only to last one year, and it is therefore highly unlikely that the "me too" provision will ever be invoked, it is equally as unlikely that once such a provision is written into a contract, it will ever be removed.

A broad proliferation and cross structuring of such clauses in labor contracts will do nothing more than irrevocably institutionalize a high rate of inflation. However, if such a clause is defined clearly, and narrowly and specifically targeted, it can serve the useful purpose of making contract provisions for similar jobs more uniform, thereby reducing pressures to construct a contract which is better than that obtained by other bargaining groups.

The "me too" clause proposed by the Association unfortunately does not so limit itself. It attaches itself to all other City of Oak Creek employment contracts regardless of the nature of work done by those employees, and it fails to make clear what would be considered a "better" plan, and in whose eyes it must be considered "better."

Additionally, the proposed clause will tend to hinder free negotiation of labor contracts between the City and the various bargaining groups. With such a clause in existence, the City will no longer be able to respond to the individual and special needs of a particular bargaining group; it will have to consider the effect of every contract's terms on other contracts with "me too" clauses. The resulting inability to freely negotiate a contract for a specific and specialized bargaining group will work to the detriment of both management and labor.

Consequently, while a long-term disability clause should be included in a contract between the City and the Association, the addition of a "me too" clause makes such a plan less desireable, and less reasonable.

Dental payment plan:

The next dispute provision involves dental insurance. The 1978-1979 contract between the City and the Association does not include a dental prepayment plan. The City's final offer proposes that no such plan be added to the 1980 contract. The final offer of the Association proposes that a dental prepayment plan having the following terms be included in the 1980 contract:

> The City shall make available to Association members coverage under a Dental Insurance Plan subject to the following conditions:
> (A) Maximum Benefit - Dental services up to a maximum of $1,000 for each participant for any one benefit period. The deductable shall be $25.00.
>
> I. Basis Benefits - Paid at 80%
>
> | | |
> |---|---|
> | Examinations | Oral Surgery |
> | X-rays | Periodontics |
> | Prophylaxis | Root Canal Therapy |
> | Extractions | Endodontics |
> | Ancillary | Denture Repair |
> | Fillings | Crown Restorations. |
> | Inlays | |
>
> II. Prosthetics - Paid at 80% (except complete upper or lower dentures which are paid at 50%).
> Partial Dentures
> Fixed and Removable Bridgwork
> Denture Relining and Rebasing
>
> III. Orthodontics - All Procedures Paid at 50%.
>
> IV. Procedure Used in the Case of a Front-end Deductable.
>
> (B) The City shall pay eighty percent (80%) of the dental insurance premium. Association members shall pay the remaining twenty percent (20%) of the dental insurance premium.

> (C) In the event that the dental insurance coverage provided in (A) above is improved for any other Oak Creek public employee labor organization during the term of this agreement, such improved coverage shall automatically be provided to the Oak Creek Professional Policemen's Association.

Seven Milwaukee area police departments offer dental insurance to their employees; South Milwaukee, Hartland, Hales Corners, and Glendale each pay 100% of the premium for such insurance, while Bayside pays 50% of the premium, Milwaukee pays 40% of the premium, and New Berlin pays 0% of the premium.

The Oak Creek Education Association is the only employee group which is provided dental insurance by the City. The plan is similar to that requested by the Association.

Dr. Peter Schelkun, the chairman of the prepayment committee of the Counsil on Dental Care Programs for the Wisconsin Dental Association indicated that an increasing number of small employers, both private and public have been introducing dental prepayment plans as fringe benefits to their employment contracts. The Association cited eight Oak Creek area private employers who provide some form of dental insurance to their employees.

However, Dr. Schelkun also implied that for a family whose head earns in excess of nineteen thousand dollars a year, as Association members will, obtaining proper dental care would not be financially difficult unless unusually

extensive care were needed. At a cost to the City of approximately $8,000.00 for providing a plan such as that proposed by the Association, it is not clear that its benefits would outweigh its cost, particularly in light of the fact that many of the major dental costs would not be paid by the City at 80%, but at a lesser rate. The fact that so few private employers, and only seven of over twenty-five area police departments have seen fit to include dental prepayment plans in their labor contracts attests to the marginal desireability of including such a plan in a labor contract.

Again, the Association has requested that a "me too" clause, similar to that included in the long-term disability proposal, be appended to the dental insurance provision. The same discussion as that had earlier concerning this clause is equally applicable here.

Consequently, while the inclusion of the proposed dental payment plan may be considered to be not beyond the bounds of reason, the unseparated "me too" clause by its broadness and lack of specificity taints the entire subject matter and marks it unreasonable.

Contract negotiations:

The last disputed provision involves contract negotiations. The 1978-1979 contract made no allowance for time off with pay for Association negotiators. The City's final offer proposes that such practice be continued. The Association asks that the following clause be added to the contract.

> The Association shall advise the City of the names of its negotiators sufficiently in advance of regularly scheduled meetings so as not to interfere with the effectiveness of the department. Association negotiators shall be permitted reasonable amounts of time for collective bargaining with respect to wages, hours, and conditions of employment and shall be released from work for such negotiation meetings without any loss of pay if negotiation meetings are scheduled during working hours. All meetings shall be scheduled by mutual consent.

Nearly every police department in the Milwaukee area, either by policy or contract, allows its police association negotiators time off with pay for the purpose of conducting contract negotiations. The officer so released usually remains on duty, providing for the event in which he would be needed.

The opportunity to take part in collective bargaining and to be represented in such bargaining by the choice of the bargaining group's members is paramount. Without such opportunity and freedom, a great blow is dealt not only to the legitimacy of the negotiations but also, and more importantly, to the morale of the bargaining group members.

The Association's request therefore is clearly a desireable and reasonable one. The City objects to the fact that no limitation is made as to the number of negotiators that the Association may select. They suggest that the absence of such a provision would unreasonably

restrict the ability of the City to simultaneously operate the police department and conduct contract negotiations. The City's concern is a valid one, but in the Arbitrator's opinion, one that would be sufficiently controled by the provisos that the Association would advise the City of the negotiators' names well in advance of negotiation meetings so as not to interfere with the effectiveness of the department, and that all meetings would be scheduled by mutual consent. The Arbitrator would also expect that the Association's actions would all be taken in good faith, and that the two parties would be able to establish reasonable guidelines to govern the number of Association negotiators involved in collective bargaining sessions.

Standing alone, this request for inclusion in the collective bargaining contract is most reasonable.

As explained at the outset, the Arbitrator's task is to choose the most reasonable final offer as a total package. The City has offered only a 9.0 percent wage increase. The Association asks for a two-step 8.0 percent and 3.0 percent wage increase, along with a long-term disability plan, a dental prepayment plan, and a negotiations clause.

The City's offer would place the 1980 Oak Creek Police contract in the average range of police contracts negotiated for 1980. The Association's offer, in the other hand, would make the 1980 Oak Creek Police contract one of the best 1980 police contracts from the standpoint of both wages and fringe benefits. As has been noted earlier, the Association's offer would give Oak Creek police the second highest monthly salary among Milwaukee area police departments

by the end of 1980. In addition to this, the Association's final offer would make the Oak Creek Police Department one of only two area departments receiving both long-term disability benefits and dental benefits. The other department receiving both benefits, the Hales Corners Police Department, however, provides salaries significantly less than even the City has offered.

An examination of the contract terms to be carried over from the 1978-1979 contract reveals the Oak Creek Police already are accorded substantial benefits: they regularly work only forty hours a week; they are liberally provided holidays and vacations with pay; sick leave is generously provided; extra longevity pay is included; they receive hospital and major medical insurance, terminal leave, funeral leave, duty incurred disability pay, a generous clothing allowance, life insurance, retirement benefits, an opportunity to further their education at the City's expense, and a well defined grievance procedure, among other things.

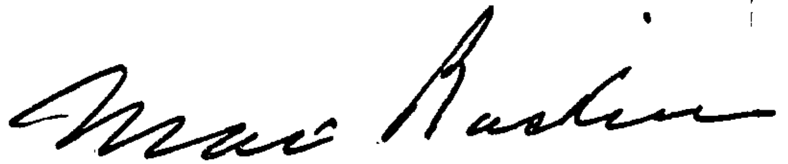
These extensive benefits, already accorded the Oak Creek Police, along with a 9.0 percent wage increase as proposed by the City, giving a policeman with three years experience a base salary of over $19,000.00 a year, would allow an Oak Creek Policeman and his family to live very comfortably and securely, and very well in comparison with other Milwaukee area policemen.

The package offered by the Association simply asks for too much at one time. While it is not clear that the cost of the Association's offer would be prohibitive, the fact that no other police department has been able to negotiate a contract with benefits as extensive as those the Association is seeking, indicates that it is unlikely that the Association could have negotiated so favorable a contract. Such comparisons with the contracts of other area departments carry considerable weight in deciding this case, since most 1980 Milwaukee area police department contracts have already been negotiated and the object of arbitration is to choose the offer which most closely resembles that which would have resulted had the parties not resorted to arbitration.

Additionally, the Arbitrator can find no evidence that the acceptance of the City's offer will dampen department morale and lower the quality of police personnel and police protection in the City of Oak Creek, as the Association's brief suggests. Indeed, testimony at the oral hearing on this matter indicated that there was a waiting list of people desiring to become Oak Creek police officers. Evidently, the wages and benefits of the job are desirable to many people. Since the City's offer will substantially keep pace with other area police departments, it is unlikely that such desirability will quickly diminish.

Consequently, since it is the arbitrator's job to determine which final offer is the most reasonable, and closest to the hypothetical contract which would have resulted had the parties reached agreement without having to resort to arbitration, the Arbitrator in this matter must find that, in light of all the evidence presented and the factors enumerated in Wis. Stat. § 111.77 (6) (1977), and for the reasons hereinbefore discussed, the final offer of the City is the most reasonable one and shall be incorporated into the Oak Creek Policemen's labor agreement with the City for calendar year 1980 without modification.

Dated: August 28, 1980



Max Raskin
Arbitrator